IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

APPEAL FROM ORDER NO.927 OF 2004
FROM
NOTICE OF MOTION NO.4447 OF 2001
IN
B.C.C.C.SUIT NO.5406 OF 2001

Prasad Chambers Premises Co.op. Soc. Ltd., A Society registered under Maharashtra Co.op Societies Act, 1960 having its Registered office at 719 Prasad Chambers, Bombay 400 024. .. Appellant (Org.Plaintiff)

Versus

1) Parimal C. Jhaveri aged 52 of Mumbai, Indian Inhabitant one of the owners of Dreamland Building situate at Mama Parmanand Marg, Opera House, Mumbai 400 004.

2) The Municipal Corporation of Greater Mumbai, a Body corporate incorporated under the provisions of Mumbai Municipal Corporation Act, 1888 having its office at Mahapalika Marg, Opp.CST, Fort, Mumbai 400 001. .. Respondents (Org.Defendants)

Mr.Y.S.Jahagirdar with Ms.Priti S. Shah for the Appellant.

Mr.Atul Rajadhyaksha with Mr.Kedar Wagle for Respondent No.1.

Smt.V.K.Khatu for Respondent No.2.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 4TH NOVEMBER 2004

ORAL JUDGMENT :

. By consent, Appeal is heard finally and disposed

of at the stage of admission.

2. The Appellant-Plaintiff is a Co-operative Society. One Raghunath Prasad Radhelal and Rajendra Prasad Radhelal, the nominees of M/s.Ajanta Construction Company entered into an agreement of building lease with Sterling Investment Corporation Private Limited on 15th February 1966. Under this agreement, it was agreed that the land admeasuring 10800 sq. yards bearing C.S. No.1487, Girgaon Division in Swadeshi Mill estate of Charni Road would be leased out to the nominees of Ajanta Construction Company by Sterling Investment Corporation Private Limited. Another piece of land was conveyed to Raghunath Prasad and Rajendra Prasad on which they constructed a building known as Prasad Chambers. The units and tenaments in this building were sold on ownership basis to various purchasers who then formed a Co-operative Society being the Plaintiff Society. On 20th June 1972, by a lease deed Sterling Investment Corporation Private Limited leased out certain property to the Plaintiff. By a deed dated 23rd June 1972, Raghunath Prasad and others conveyed the building known as Prasad Chambers to the Plaintiff. Sterling Investment Corporation Private Limited conveyed lands together with building and structures thereon to the Plaintiff on 1st July 1972. The structures included the building known as Prasad Chambers. The description of the properties

contained in the deed of conveyance of 1st July 1972 is as follows :-

" THE FIRST SCHEDULE ABOVE REFERRED TO :

ALL THOSE pieces or parcels of land hereditaments and premises situate at Tata Road Nos.1 and 2 near Charni Road, Bombay, in Registration District and Sub-District Bombay, containing by admeasurement 10,800 square yards equivalent to 9030.20 square metres or thereabouts and bearing Cadestral Survey No.1487 part of Girgaum Division and assessed by the Assessor and Collector, Bombay Municipal Corporation under D Ward Nos.1220-21 and 1226 and Street Nos.7 - 9 - 11, Tata Road, and Ward and Street Nos.:

1. D-186(2) & 190 (1-2) 290	)	Raja Ram Mohan Roy Road.
2. D-187-158	)	Tata Road No.1.
3. D-189-15A	)	Tata Road No.1.
4. D-196(1) 9	)	Tata Road No.1.
5. D-196(2) 7	)	Tata Road No.1.
6. D-1219 & 1224-25-3-3A.	)	Tata Road No.1.
7. D-1223 - 11-11D-15	)	

and bounded as follows :

On or towards the North West by the Tata Road No.1, beyond by leasehold property bearing Cadestral Survey No.6/1487, 7/1487 of the Girgaum Division.

On or towards the North by 40 ft. wide Road known as Tata Road No.2 beyond that partly by the property bearing Cadestral Survey No.8/1487, partly by Charni Road.

On or towards the East partly by Charni Road, partly by the property called Albless Bagh bearing Cadestral Survey No.1 of the Girgaum Division, beyond that Charni Road.

On or towards the South partly by the said Albless Bagh property bearing Cadestral Survey No.21 of the Girgaum Division and partly by the Cadestral Survey No.16, belonging to Shiv Laxmi Kalidas and Kalidas

Jadhavji and partly bearing the Cadestral Survey No.14 of the Girgaum partly of the property bearing Cadestral Survey No.1448 belonging to Miss Gauhar Kayum and Mamajiwala.

On or towards the West partly of the said property bearing the said Cadestral Survey No.1614 and 1488 of the Girgaum Division and partly by the Tata Road No.1. beyond by the Leasehold property bearing Cadestral Survey No.6/1487.

THE SECOND SCHEDULE ABOVE REFERRED TO :

ALL THOSE piece or parcels of land hereditaments and premises situate at Tata Road Nos.1 and 2 bear Charni Road, Bombay in the Registration District and Sub-District, Bombay, containing by admeasurement 5300 Square Yards equivalent to 4473.13 square metres or thereabout and partly bearing Cadestral Survey No.1487 part of Girgaum Division and forming part of the land hereditements and premises described in the First Schedule hereunder written and assessed by the Assessor and 1226 and Street Nos.7-9-; and bounded as follows -

On or towards the North by 40 ft. wide Private Road known as Tata Road No.2.

On or towards the South by 20 ft. passage coming from New Queen’s Road and going inside the property bearing Cadestral Survey No.1487, beyond that partly the property of Miss Gauhar Kaum and Mamajiwala bearing Cadestral Survey No.1488 and partly by the property of the Lessors. Beyond that the property of Hirmusji Sorabji and others bearing Cadestral Survey No.14 of the Girgaum Division and partly by the property bearing Cadestral Survey No.16 belonging to Shiv Laxmi Kalidas and Kalidas Jadhavji and partly of Albless Bagh bearing bearing Cadestral Survey No.21.

On or towards the West by building wall of the Lessors and beyond that the partly by the 20 ft. wide passage and partly by Tata Road No.1 and partly by 40 feet wide passage and partly by Tata Road No.1 and partly 40 feet wide Tata Road No.2.

> On or towards the East by the building wall of the Lessors beyond that Charni Road and partly by the passage and partly by the wall of the property of Albless Bagh bearing Cadestral Survey No.21 of the Girgaum Division and partly by Cadestral Survey No.16 belonging to Shiv Laxmi Kalidas and Kalidas Jadhavji."

The Plaintiff has claimed that a 20 feet wide passage coming from New Queens Road which is now known as Mama Parmanand Marg and going inside the property C.S. No.1487 is part of its property and was conveyed to it by the deed of conveyance of 1st July 1972. Defendant No.1 is the owner of the building constructed on C.S. No.1488. According to the Plaintiff, the Defendant No.1 has broken open the boundary wall between C.S. No.1488 which is owned by Defendant No.1 and C.S.No.1487 which is owned by the Plaintiff. This boundary wall has been broken by Defendant No.1 in order to gain access to the 20 feet wide road which opens out on Mama Paramanand Marg.

3. According to Defendant No.1, this boundary wall which he has broken is between his property bearing C.S.No.1488 and the 20 feet wide road which bears C.S. No.1487/4. Defendant No.1 claims that there was always a gate between C.S.No.1488 and C.S. No.1487/4 which constitutes the 20 feet wide passage. According to Defendant No.1 he has merely put up a new gate since the old one was in a state of disrepair.

4. The dispute, therefore, is whether the 20 feet wide passage is owned by the Plaintiff which would entitle it to an interim injunction restraining Defendant No.1 from accessing the 20 feet wide road.

5. The trial Court has denied the temporary injunction by concluding that the 20 feet wide road is not owned or in possession of the Plaintiff and, therefore, the Plaintiff is not entitled to injunction.

6. The entire dispute, therefore, revolves around the issue as to whether the 20 feet wide passage is within the property which is owned by the Plaintiff or is a common passage which can be accessed by all.

7. An affidavit has been filed by the Mumbai Municipal Corporation before the trial Court which reads as follows :

> "1. I say that the land bearing C.S.No.1/1487, 5/1487 and 7/1487 is belonging to the Corporation and the same is given on lease to the Sterling Investment. I say that as far as C.S.No.4/1487 is concerned, it is a freehold property and MCGM was never the owner in respect of the said strip of land. I say that my department does not have any single document to show that MCGM is the owner of C.s.No.4/1487 having the said strip of land was merged into C.S.No.1487. I say that said fact can be verified from the

Superintendent of Land Record, Mumbai City."

The Corporation has stated very clearly that the C.S.No.4/1487 was never owned by the Corporation and was never leased to anybody. In fact, according to the Corporation, this portion merged with Survey No.1487.

8. The pleadings before the trial Court indicate that first Defendant has access to his property from New Queen's Road. The access from Tata Road No.1 to the Plaintiff's property is through the main gate. This would indicate that the Plaintiff always had access through the main gate on Tata Road No.1 whereas the first Defendant had access to his property only from New Queen's Road. It is sought to be urged by the first Defendant that there was always a gate in the boundary wall between the property of the first Defendant and the 20 ft. passage and that he had only recently repaired the existing gate as permitted by the Court. The trial Court has found that the plans produced indicate that the Plaintiff was not the owner of the property bearing Cadastral Survey No.1487/4 i.e. the 20 ft. wide passage. However, this finding of the trial Court has been given without considering the fact that the affidavit of the Mumbai Municipal Corporation filed before the trial Court indicates that there has been a merger of C.S.No.1487/4 with C.S.No.1487. The trial

Court after considering certain documents on record, has held that the Plaintiff is not the owner of the strip of 20 feet and, therefore, is not entitled to an interim injunction restraining the Defendant No.1 from access to the 20 feet passage through the boundary wall.

9. In my view, the trial Court has not considered that the Bombay Municipal Corporation has stated on affidavit that C.S.No.1487/4 has been merged with C.S.No.1487 and, therefore, there would be no question of the first Defendant having any right to this portion. An extract has been produced by the Defendant from the Superintendent, Mumbai City Survey & Land Records dated 19th August 2004 showing C.S.No.1487 and 4/1487. However, the number "4/1487" has been written in different ink. The genuineness of this document will therefore have to be examined.

10. According to the first Defendant, the gate always existed between his property and the passage and he only sought to repair it. If indeed that was the position, there would have been no occassion for the boundary wall to have been broken open. As observed by the Commissioner appointed by the Court, the boundary wall was old and had been demolished in the middle and an iron gate was fixed in this portion; the concrete below the

gate appeared to be fresh. All these factors, in my opinion, prima facie indicate that the boundary wall has been broken open by the first Defendant.

11. In my view, a case has been made out by the Plaintiff for granting the relief sought in the Notice of Motion. The Plaintiff is in possession of this 20 feet passage. Therefore, the Plaintiff would be entitled to an injunction restraining the first Defendant from using the said passage and the gate in the boundary wall for ingress and egress into his property being C.S.No.1488. In any event, no hardship will be caused to the first Defendant if this access is denied. He already has access to the property from New Queen's Road i.e. Mama Parmanand Road.

12. Appeal allowed. No order as to costs.

13. Notice of Motion is made absolute in terms of prayer clause (a).

14. Mr.Rajadhyaksha seeks stay of this order which is vehemently opposed by Mr.Jahagirdar for the Plaintiff.

15. By an order of 16th February 2004, the trial Court had directed parties to maintain status quo as per the Commissioner's report. No prejudice would be caused

to the first Defendant if stay as requested is not granted as he has an alternate access to his property. Stay refused.

16. In view of the Appeal From Order being disposed of, nothing survives in Civil Application No.1270 of 2004 and the same is disposed of accordingly.